

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
BONNIE WEISS, OFFICER OF :
HACO CANON CORPORATION :
:
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for :
the Period December 1, 1987 through November 30, 1990.

DETERMINATION
DTA NOS. 812599
AND 812600

In the Matter of the Petition :
of :
ESTATE OF THEODORE WEISS, :
OFFICER OF HACO CANON CORPORATION :
:
for Revision of a Determination or for Refund of Sales and :
Use Taxes under Articles 28 and 29 of the Tax Law for the :
Period December 1, 1987 through November 30, 1990.

Petitioner Bonnie Weiss, officer of Haco Canon Corporation, c/o Harry Schochat, Esq., 8 Lunar Drive, Woodbridge, Connecticut 06525, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through November 30, 1990.

_____Petitioner Estate of Theodore Weiss, officer of Haco Canon Corporation, c/o Bonnie Weiss, Executrix, c/o Harry Schochat, Esq., 8 Lunar Drive, Woodbridge, Connecticut 06525, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through November 30, 1990.

_____A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on October 25, 1994 at 9:30 A.M., and was continued to conclusion on June 26, 1997 at 10:15 A.M., with all briefs to be submitted by December 30, 1997, which date began the six-month period for the issuance of this determination. Petitioners appeared at the October 25, 1994 hearing by Peter R. Newman, Esq., and at the June 26, 1997 hearing by Harry Schochat, Esq. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Brian J. McCann, Esq., of counsel). Subsequent to the hearing, this matter was assigned to Timothy J. Alston, Administrative Law Judge, who renders the following determination.

ISSUES

- _____I. Whether the Division of Taxation properly assessed petitioner Bonnie Weiss as a person required to collect tax under Tax Law § 1131(1) and § 1133(a) on behalf of Haco Canon Corp.
- II. Whether petitioners have established errors in the Division's audit results.

FINDINGS OF FACT

1. On August 17, 1992, following an audit, the Division of Taxation ("Division") issued identical notices of determination to petitioners, Bonnie Weiss and Estate of Theodore Weiss, as officers of Haco Canon Corporation. The notices assessed \$448,691.37 in tax, plus accrued penalty and interest, for a total amount due of \$785,593.89 for the periods December 1, 1987 through February 29, 1988 and September 1, 1988 through November 30, 1990. The notices also advised petitioners of the Division's position that each was liable as an officer or responsible person of Haco Canon Corporation.

2. Although the notices indicate \$448,691.37 in tax due, the actual amount of tax asserted due from petitioners was \$424,242.37. This discrepancy resulted from the fact that the Division's audit revealed overpayments by Haco Canon Corporation totaling \$24,449.00 for the period March

1, 1988 through August 31, 1988. The notices of determination do not account for these overpayments.

____3. Haco Canon Corporation's business was the retail sale of fuel oil. Haco Canon also sold, installed and serviced heating systems. Prior to his death in October of 1990, Theodore Weiss was the president of Haco Canon and was in charge of its day-to-day operations. Petitioner Bonnie Weiss was vice president of the corporation at all times relevant herein.

4. The assets and business of Haco Canon Corporation were sold on or about November 29, 1990. Pursuant to the contract of sale, the purchaser of the business was required to collect all then-existing accounts receivable and pay such receivables over to Haco Canon.

5. The Division of Taxation's audit of Haco Canon Corporation was originally to be conducted through the Division's Brooklyn office. Pursuant to a letter dated October 6, 1989 and addressed to the Division's Brooklyn office, Mr. William Fore, CPA, in referring to Haco Canon Corporation, requested that "this case" be transferred to the Division's Hauppauge Office, and that Mr. Fore's "client" wished that Mr. Fore's office represent "him" in "this matter". On December 5, 1990, the Division's auditor in this matter, Mr. James Sullivan, assigned to the Division's Hauppauge office, telephoned Mr. Fore, Haco Canon's accountant, to schedule an appointment to examine the books and records of Haco Canon Corporation. By letter to Haco Canon dated December 5, 1990 the Division confirmed the appointment scheduled with Mr. Fore and also requested that the corporation make available all books and records pertaining to its sales tax liability for the period December 1, 1987 through the date of sale of the business.

6. In response to the Division's request for records, Haco Canon produced its sales tax returns for the audit period, but did not produce any worksheets related to the sales tax returns. The corporation produced copies of its Federal income tax returns for its fiscal years ended May 31, 1988 and May 31, 1989. The corporation produced a copy of an unfiled Federal return for its

fiscal year ended May 31, 1990, dated August 8, 1990, and, later, a revised version of the same return, also unfiled, dated May 22, 1992. Haco Canon also made available a general ledger for the entire audit period except May 1989. It produced a sales journal for the period October 14, 1989 through October 31, 1990. Haco Canon did not produce any purchase journals, cash receipts journals or check disbursement journals. Haco Canon produced some purchase and sales invoices, service contracts, exemption certificates and capital improvement certificates.

7. During the audit, Mr. Fore advised the auditor that Haco Canon was unable to produce many of its purchase and sales records for the period at issue because many of the corporation's records had been discarded by the new owners following the sale of the business on November 29, 1990. The auditor was also advised by Mr. Fore and later by petitioner Bonnie Weiss that the new owners of the business were not cooperating with Ms. Weiss in allowing her to obtain relevant information.

8. Upon review the Division determined that the records made available in response to its request were incomplete and therefore decided to calculate Haco Canon's sales tax liability from such information as was available.

9. The additional tax due for the period December 1, 1987 through November 30, 1990 as determined by the Division had four components: (1) \$346,424.23 in additional tax due on sales; (2) \$38,686.52 in additional tax due on purchases of materials used in capital improvements; (3) \$14,816.97 in additional tax due on fixed asset acquisitions; and (4) \$24,314.65 in additional tax due on a bulk sale of assets.

10. The additional tax due on Haco Canon's sales was based on a reconciliation of sales tax due as reported on Haco Canon's sales tax returns and the amounts recorded in the sales tax payable account in the general ledger. The general ledger was provided to the Division on audit by Mr. Fore. Mr. Fore's office prepared the general ledger from Haco Canon's original books of

entry. Mr. Fore advised the auditor that he prepared Haco Canon's sales tax returns based on the sales tax accrual account in the general ledger. He further advised the auditor that he did not make any adjustments to these figures and that Bonnie Weiss had made adjustments for bad debts.

11. The additional tax due on purchases of material used in capital improvement work was determined by analyzing Haco Canon's sales journal for the period October 14, 1989 through October 31, 1990, the only period for which such records were available. Based upon this analysis, the Division determined that 5.06% of Haco Canon's gross sales were attributable to capital improvement work. The Division then reviewed the service contracts for eight capital improvement jobs during the October 14, 1989 through October 31, 1990 period and determined that 48.46% of Haco Canon's capital improvement billings were attributable to materials purchases, and that tax had not been paid on 83.03% of such materials purchases.¹ These results were then applied to gross sales for the entire audit period resulting in a determination of \$38,686.52 of additional tax due in this area.

12. The tax due on Haco Canon's fixed asset acquisitions was determined by reviewing the corporation's unfiled Federal income tax return for the year ended May 31, 1990. The balance sheet portion of this return showed assets at the end of the fiscal year of \$548,444.00. On audit Haco Canon produced a depreciation schedule for the fiscal year ended May 31, 1990 detailing corporate asset acquisitions totaling \$368,844.38. The Division determined that the corporation had shown that no additional tax was owed on the assets detailed on the depreciation schedule. The Division further determined that tax was due on the remaining \$179,599.62 in assets as indicated by the tax return but which were not detailed on the depreciation schedule. The Division

¹ Copies of the eight contracts reviewed by the Division were included in the auditor's workpapers (pp. C-1 through C-45) which were entered into evidence herein.

calculated tax due in the amount of \$14,816.97 with respect to these asset purchases and, using an error rate, allocated this amount over the entire audit period.

13. Regarding the bulk sale component of the assessment, the Division's auditor determined that the corporation had made a bulk sale of its assets when the business was sold in November 1990. The corporation had not, however, filed any notification of such bulk sale and had not paid sales tax on the transfer of such assets. The Division calculated tax due on the transfer in bulk of the corporation's assets based on the depreciated value of the corporation's assets as listed on its unfiled Federal income tax return for the year ended May 31, 1990.

14. During the audit, Mr. Fore advised the Division's auditor that Bonnie Weiss participated in the operation of Haco Canon along with her husband. The auditor relied primarily on this information as provided by Mr. Fore in his decision to assess Ms. Weiss as a responsible officer of Haco Canon. At the time he decided to assess Ms. Weiss as a responsible officer, the auditor was also aware of the information contained on the corporation's unfiled Federal income tax return for the year ended May 31, 1990 (*see*, Finding of Fact "22").

15. Although he was Haco Canon's accountant at all times relevant herein, Mr. Fore did not provide the Division with a valid power of attorney to act as Haco Canon's representative during the audit. (Mr. Fore did provide a power of attorney signed by Haco Canon's attorney at the time of the audit, Peter Newman, Esq., but was advised by the Division that such a power was invalid.) Both Bonnie Weiss and Mr. Newman were aware that Mr. Fore was working with the auditor and that Mr. Fore had provided the auditor with the general ledger. During the audit Ms. Weiss attempted to explain the difference between the sales tax accrual account and the sales tax reported on the sales tax returns as the result of bad debts.

16. During the audit, petitioner Bonnie Weiss produced a list of Haco Canon sales accounts claimed to be uncollectible. This list became part of the auditor's workpapers (pp. B-11 through

B-59 thereof) which were submitted into evidence. This list was unsupported by any source documentation.

17. At the hearing petitioners submitted a listing of 81 judgement and lien filings from the offices of the New York, Kings and Queens county clerks. Haco Canon is listed as creditor on each of these filings, the vast majority of which are described as mechanics liens. The remaining filings are described as lis pendens. Each of the filings lists information regarding the creditor, the amount of the debt, the property which was the subject of the lien, the date of filing and the date of expiration. The filings did not contain any information regarding the transactions which gave rise to the liens.

18. Haco Canon's filed Federal income tax returns for the years ended May 31, 1988 and May 31, 1989 claim no bad debt deductions. The unfiled Federal return for the year ended May 31, 1990 dated August 8, 1990 also claims no bad debt deduction. The revised Federal return for the year ended May 31, 1990, dated May 22, 1992, and also unfiled, claims a bad debt deduction of \$454,882.00.

19. Following the hearing in this matter held on October 25, 1994, petitioners issued a subpoena duces tecum on January 25, 1995 to the purchasers of the business in order to obtain sales records related to the audit period. In response the purchasers filed a motion to quash in Supreme Court, Kings County and ultimately prevailed following an appeal to the Appellate Division, First Department. Petitioners also unsuccessfully attempted to obtain records from the purchasers by an action brought in bankruptcy court.²

20. In connection with the motion to quash referred to above, petitioner Bonnie Weiss filed an affidavit dated February 9, 1995. In referring to her pending petition with the Division of Tax

² Haco Canon filed a petition in bankruptcy on October 29, 1992. As vice president, petitioner Bonnie Weiss signed the bankruptcy petition on behalf of Haco Canon.

Appeals, Ms. Weiss's affidavit states: "There is no question pending of whether I was a responsible officer. There is the question of the amount of my derivative liability that arose out of my having been an officer of Haco."

21. As vice president of Haco Canon, petitioner Bonnie Weiss signed the corporation's sales tax returns for the periods December 1, 1987 through February 29, 1988 (dated August 2, 1991) and June 1, 1990 through August 31, 1990 (dated November 26, 1990). Bonnie Weiss also signed the corporation's New York franchise tax report for the year ended May 31, 1988 (dated September 23, 1988), the corporation's Metropolitan Business Tax Surcharge Report (Form CT-3M/4M) for the year ended May 31, 1988 (dated September 23, 1988), and an Application for Automatic Six-month Extension for Filing Tax Report or Return (Form CT-5), also dated September 23, 1988. In addition, Ms. Weiss signed an Election by a Federal S Corporation to be Treated as a New York State S Corporation (Form CT-6) dated May 24, 1990. This Form CT-6 indicates that Bonnie Weiss and Theodore Weiss each own 100 shares of Haco Canon stock acquired June 1, 1980. Bonnie Weiss also signed a Federal Form 3115 (Application for Change in Accounting Method) on behalf of Haco Canon, dated September 23, 1988 and, according to the form, effective June 1, 1987.

22. According to Schedule E (Compensation of Officers) of the unfiled Federal income tax return of Haco Canon for the year ended May 31, 1990, dated August 8, 1990 and later revised May 22, 1992, Bonnie Weiss devoted 100% of her time to the business and was paid a salary of \$37,500.00 for that year. The same return also indicates that Theodore Weiss owned 100% of the corporation's stock, devoted 100% of his time to the business and was paid a salary of \$39,000.00 for that year.

23. The filed Federal income tax returns for the years ended May 31, 1988 and May 31, 1989 list only Theodore Weiss under Schedule E thereof.

24. Although in attendance at both sessions of the hearing held in this matter, petitioner Bonnie Weiss did not testify. During the course of the hearing Administrative Law Judge Faulkner advised petitioners' representative that the opportunity for petitioner Bonnie Weiss to testify in this matter was at the hearing. The record shows that the Administrative Law Judge and the representatives extensively discussed the question of whether Ms. Weiss would testify. Administrative Law Judge Faulkner also provided petitioners' representative with the opportunity to privately confer with petitioner Bonnie Weiss in deciding whether she would testify. Prior to the close of the hearing, Judge Faulkner advised petitioners' representative that, with certain specific exceptions no longer relevant, no further evidence would be accepted into the record after the completion of the hearing on June 26, 1997.

25. Following the hearing, petitioners submitted affidavits of Bonnie Weiss and William Fore. By letter dated September 18, 1997, Administrative Law Judge Faulkner rejected such affidavits because, with certain specific exceptions not relevant at this time, the record in this matter was closed after the completion of the hearing held on June 26, 1997. Petitioners later submitted the same affidavits after this matter was transferred to Administrative Law Judge Alston. By letter dated November 5, 1997, Administrative Law Judge Alston also rejected the affidavits.

26. Following the hearing, petitioners submitted certain documents to refute the Division's assessment of tax due in the area of fixed asset acquisitions. Specifically, petitioners submitted a bill of sale dated February 24, 1986, indicating the purchase of a boat (official number 588616) by Tebone, Inc., a Delaware corporation; Tebone, Inc.'s State of Florida Department of Revenue Sales and Use Tax Return for the period "06-86" with the reference "#588616 Boat", indicating taxable sales of \$179,600.00 and an amount due of \$8,980.00; a personal check dated July 21, 1986 in the amount of \$8,980.00 drawn on the account of Ted Weiss and Bonnie Weiss and payable to "Dept of Revenue"; a United States Coast Guard Certificate of Documentation dated May 11, 1988 for a

vessel (official number 588616) owned by Tebone, Inc.; and a mortgage dated June 24, 1988 given by Tebone, Inc. to Provident Savings Bank on its vessel (official number 588616) in the amount of \$206,000.00. At hearing, Administrative Law Judge Faulkner specifically granted petitioners' request to submit documentation to refute the assessment in the area of fixed asset acquisitions.

27. During the audit, petitioner Bonnie Weiss, as an officer of Haco Canon Corporation, executed three consents extending the limitations period for assessment of sales and use taxes due from Haco Canon for the period at issue. At the hearing in this matter held on June 26, 1997, the Division conceded that such consents did not extend the period of limitations for assessment of tax due from petitioners Bonnie Weiss and the Estate of Theodore Weiss. Accordingly, the Division agreed to cancel the portion of the assessments against petitioners Bonnie Weiss and the Estate of Theodore Weiss relating to the quarters ended before June 1, 1989, with the exception of the quarter ended February 29, 1988.³

28. Petitioners do not dispute that Theodore Weiss was a responsible officer of Haco Canon Corporation within the meaning of Tax Law § 1131(1) and § 1133(a).

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) imposes personal liability for sales and use tax imposed, collected, or required to be collected under Article 28 of the Tax Law upon persons required to collect tax. During the period at issue, Tax Law § 1131(former [1]) defined such "persons" as including "any officer, director or employee of a corporation or of a dissolved corporation . . . who as such officer, director or employee is under a duty to act for such corporation . . . in complying with any requirement of [Article 28]."

³ This exception results from the fact that Haco Canon's sales tax return for the quarter ended February 29, 1988 was not filed until 1991 (*see*, Finding of Fact "21"). The assessments against petitioners with respect to this period, as well as the period June 1, 1989 through November 30, 1990, were therefore issued within the three-year limitations period prescribed in Tax Law § 1147(b).

B. In determining an individual's personal liability under Tax Law § 1133(a), it is a settled matter that the holding of corporate office does not result in the per se tax liability of an officeholder (*Chevlowe v. Koerner*, 95 Misc 2d 388, 407 NYS2d 427). Rather, finding a person to be an individual responsible for collecting and paying over sales and use taxes must turn on the particular facts of each case (*Matter of Cohen v. State Tax Commn.*, 128 AD2d 1022, 513 NYS2d 564). "The question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee" (*Matter of Constantino*, Tax Appeals Tribunal, September 27, 1990). Factors to consider in determining responsibility include:

The individual's status as an officer, director or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interests in the corporation [citations omitted]. (*Matter of Constantino, supra.*)

C. Before applying these legal principles to the facts herein it is particularly important in this case to note that the Division of Taxation does not have the burden of proving the propriety of its assessment (*see, Matter of A & J Gifts Shop v. Chu*, 145 AD2d 877, 536 NYS2d 209, *lv denied* 74 NY2d 603, 542 NYS2d 518), for a presumption of correctness attaches to a notice of determination upon its issuance (*see, Matter of Hammerman*, Tax Appeals Tribunal, August 17, 1995), and the burden of proving an assessment erroneous rests with the taxpayer (*see, Allied New York Services v. Tully*, 83 AD2d 727, 442 NYS2d 624).

D. A review of the record in this matter compels the conclusion that petitioner Bonnie Weiss has failed to rebut this presumption and has thereby failed to overcome her burden of proof to show that she was not under a duty to act for Haco Canon Corp. within the meaning of

Tax Law § 1131(1). The Division's assertion of personal liability against petitioner pursuant to Tax Law § 1133(a) was therefore proper.

____ Specifically, the record indicates that Bonnie Weiss was vice president of Haco Canon during the period at issue and, in that capacity, she signed certain sales tax returns, a New York State franchise tax report, an application for a six-month extension to file a New York franchise tax return, an election for treatment as a New York State S corporation, and an application for change in the corporation's accounting method (*see*, Finding of Fact "21"). Contrary to petitioners' assertion, except for the sales tax return for the period December 1, 1987 through February 29, 1988, Ms. Weiss signed all such documents during the period at issue.

Additionally, the unfiled Federal income tax return for the year ended May 31, 1990 indicates that she devoted 100% of her time to the business and was paid \$37,500.00 in salary for that year. Moreover, although the returns for the years ended May 31, 1988 and May 31, 1989 do not list Bonnie Weiss as an officer (*see*, Finding of Fact "23"), she did sign tax returns and other tax documents as vice president during those years (*see*, Finding of Fact "21"). In the absence of any other evidence to the contrary, it must be concluded that Bonnie Weiss was vice president of Haco Canon during those years. Moreover, the affidavit filed in connection with the motion to quash indicates that, as of the date of the affidavit, Ms. Weiss considered herself a responsible officer of the corporation (*see*, Finding of Fact "20").

While the facts recited above do not constitute overwhelming evidence of responsible officer status, the lack of evidence submitted by petitioners on this issue compels the conclusion that petitioners have failed to meet their burden of proof to overcome the assessment (*see, Matter of Bartolomei*, Tax Appeals Tribunal, April 3, 1997). This result is also supported by the strong inference properly drawn in favor of the Division in this case by petitioner Bonnie Weiss's

failure to take the stand to contradict the Division's case (*see, Turner Press, Inc. v. Gould*, 76 AD2d 906, 429 NYS2d 239, 240; *see also, Noce v. Kaufman*, 2 NY2d 347, 161 NYS2d 1).

E. Petitioners contended that, on audit, the Division failed to examine whether Bonnie Weiss was a responsible officer of Haco Canon following the guidelines discussed in *Matter of Constantino (supra)*, and that the Division "failed to set forth a methodology conforming to the law and regulations to support its determination that Bonnie Weiss was a responsible person." (Petitioners' brief p. 6.)

Petitioners' contention is without merit. Where a petitioner fails to introduce any evidence challenging an assessment, the issuance of the assessment itself provides the rational basis for the assessment (*see, Matter of Gucci*, Tax Appeals Tribunal, July 10, 1997). This rule necessarily follows from the well-established principles set forth in Conclusion of Law "C". Here, petitioners introduced no evidence on the issue of Bonnie Weiss's status as a responsible officer. This failure to challenge the responsible officer determination thus provides the rational basis for the Division's determination that Ms. Weiss was such a person.

Moreover, even if the Division were required to establish that its decision to assess Bonnie Weiss had a rational basis, the record shows that this decision was rational. In making this decision, the Division's auditor relied on the corporation's accountant's statement to him that Ms. Weiss was involved in running the corporation (*see*, Finding of Fact "14"). Contrary to arguments made by petitioners at hearing, the fact that Mr. Fore did not have a valid power of attorney to represent Haco Canon does not impair the probative value of this statement, for there is no doubt that he was the corporation's accountant. It was reasonable, therefore, for the Division to rely on his statement as to who ran Haco Canon. The Division's auditor was also aware of the information contained on the corporation's Federal return for the year ended May

31, 1990 at the time he decided to assess Ms. Weiss (*id.*). The Division thus clearly had a rational basis to conclude that Bonnie Weiss was a responsible officer of Haco Canon.

F. Petitioners also asserted that petitioner Bonnie Weiss was not responsible for the portion of the assessment resulting from the difference between the general ledger and reported taxable sales because she had no knowledge of the sales tax accrual account in the general ledger and that the improper calculation of tax liability by Mr. Fore constituted a deceptive accounting practice. Petitioner contends that she was thus precluded from exercising her authority as a responsible officer and therefore cannot be held liable for this portion of the assessment (*see, Matter of Russack*, Tax Appeals Tribunal, February 8, 1996).

This assertion is rejected. Obviously, if petitioner did not know about the general ledger or if she believed that Mr. Fore had engaged in deceptive accounting practices, she could have testified at the hearing. Certainly, if these serious allegations are to be accorded any credibility, it is reasonable to expect some evidence to back them up. Ms. Weiss, however, chose not to testify, and no other evidence was presented in support of these allegations. Additionally, the fact that Mr. Fore did not have a power of attorney does not affect this result. He was the corporation's accountant throughout the period at issue, and if the general ledger did not accurately reflect the books and records of Haco Canon, it was petitioners' burden to prove this point.

G. Regarding the rejection of petitioners' post-hearing submission of affidavits (*see*, Finding of Fact "25"), petitioners continue to maintain that the affidavits of Bonnie Weiss and William Fore should have been received in evidence in this matter. The Tribunal's Rules of Practice and Procedure allow the submission of affidavits in lieu of oral testimony, provided that such affidavits are submitted *before the record has been closed* (*see*, 20 NYCRR 3000.15[d][1]).

Here, petitioners did not submit the Weiss and Fore affidavits at the hearing; nor did they request that the record be held open for the submission of such affidavits post-hearing. The Tax Appeals Tribunal's policy of not allowing evidence after the closing of the record is both well established (*see, e.g., Matter of Anzilotti*, Tax Appeals Tribunal, February 22, 1996) and well founded as it provides both "definition" and "finality" to the hearing process and thereby serves to "maintain a fair and efficient hearing system" (*Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991). The Weiss and Fore affidavits were thus properly excluded from the record herein.

H. Turning to the audit itself, petitioners contended that the difference between the amounts reported as sales in Haco Canon's general ledger and taxable sales as reported on Haco Canon's sales tax returns was the result of bad debts incurred by the corporation. Petitioners further contended that the Division erroneously failed to give Haco Canon Corporation credit for bad debts incurred. Petitioners asserted that sufficient proof of these bad debts was shown in documents submitted to the auditor and in the mechanics lien search submitted by petitioners at the hearing. Petitioners' assertion is unfounded. Tax Law § 1132(e) authorizes the Division to provide by regulation for credit or refund of tax paid where the receipt has been ascertained to be uncollectable. The regulations promulgated under this authority provide that no such credit or refund may be sought "until an account has been found to be uncollectable *and has been actually charged off for federal income tax purposes*" (20 NYCRR 534.7[d][1] [emphasis added]). In this case, petitioners have not shown that Haco Canon ever claimed a bad debt deduction for Federal income tax purposes. Specifically, the returns for the years ended May 31, 1988 and May 31, 1989 do not claim a bad debt deduction and, while the revised version of the return for the year ended May 31, 1990 (dated May 22, 1992) claims a large bad debt deduction, petitioners have never shown that this return was filed. In addition, the listing of claimed bad debts provided to

the Division during the audit and the listing of mechanics liens submitted at hearing were insufficient because neither of these listings was supported by any source documentation showing that the claimed bad debts resulted from sales which occurred during the audit period.

I. Petitioners have also failed to show that an adjustment to the tax assessed on fixed asset acquisitions is warranted. Petitioners argued that the asset which was taxed by the Division, i.e., the asset which accounted for the difference between the tax return and the depreciation schedules and thereby resulted in the assessment in this area, was a boat purchased in Florida (*see*, Finding of Fact “26”). Petitioners further asserted that sales tax was paid on the purchase of this boat. Given the near identity between the purchase price of the boat as indicated by the Florida sales tax return and the assets taxed by the Division, it is certainly possible that the boat was in fact the asset which was taxed. Even if true, however, this fact is insufficient to require an adjustment to the assessment, for the evidence in the record merely shows that the boat was purchased and Florida sales tax was paid by a corporation named Tebone, Inc. However, it is *Haco Canon’s* acquisition of the asset which the Division has assessed in this case and there is no evidence in the record to show that *Haco Canon* paid sales tax to any jurisdiction upon its acquisition of the asset. Indeed, there is no evidence in the record explaining when or how *Haco Canon* acquired this asset.

J. Petitioners also failed to show that the Division’s assessment of tax on materials used in capital improvements was erroneous. Petitioners contended that an adjustment in this component of the assessment was required because the auditor’s workpapers C-1 through C-45, which included the contracts for the eight capital improvement jobs analyzed in detail by the Division on audit, indicated that *Haco Canon* had “billed, collected and paid all of the sales taxes on assets purchased for sale to building owners it was required to collect” (Petitioners’ brief p. 9).

While the contracts between Haco Canon and its customers do indicate that Haco Canon charged its customers sales tax on the sale and installation of burners and boilers, this fact does not require an adjustment to the Division's assessment. As a contractor, Haco Canon was required to pay sales tax on its purchase of materials used in the performance of capital improvement jobs (*see*, Tax Law § 1101[b][4][i]). The Division's audit showed that Haco Canon had failed to pay sales tax on 83.03% of the materials used in capital improvement work and assessed tax accordingly. Haco Canon's collection of tax from its customers on sales of capital improvement services was improper, since sales of such services are not subject to tax (*see*, Tax Law § 1105[c][3][iii]). The corporation's obligation to pay tax on its purchases of materials used in capital improvement work was not negated because it improperly charged and collected tax on its sale of capital improvement services.

K. The petitions of Bonnie Weiss, officer of Haco Canon Corporation, and the Estate of Theodore Weiss, officer of Haco Canon Corporation, are denied, and the notices of determination dated August 17, 1992, as modified pursuant to Findings of Fact "2" and "27", are sustained.

DATED: Troy, New York
May 14, 1998

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE
